FILED
DEC 20 1948
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1948

No. 470

EUGENE V. HENSLEY, JAMES W. HENSLEY, UNITED SALES COMPANY, a corporation, and UNITED DISTRIBUTORS, INC., a corporation,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof

FRED A. IRONSIDE, JR.
810 Luhrs Tower
Phoenix, Arizona
Attorney for Petitioners

LOUIS B. WHITNEY
810 Luhrs Tower
Phoenix, Arizona
Of Counsel

Subject Index

Page

Petition: 1

Statement 2

Jurisdiction 4

Questions Presented 4

Reasons for Granting the Writ 6

Statute and Regulations Involved 7

Supporting Brief: 9

Point I—The False Making of an Entry Indicating the Name and Address of the Person or Persons to Whom Distilled Spirits Were Sent, in a "Transcript," i.e., in Form 52B, Is Not a Crime Under Title 26 U.S.C.A. Section 2857 9

Point II—Title 26 U.S.C.A. Section 2857 Does Not Constitutionally Empower or Delegate Power to, the Commissioner of Internal Revenue to Promulgate a Regulation, or Prescribe a Form, Whereunder or Whereby a Wholesale Liquor Dealer Must Keep a Record and Make an Entry Therein Indicating the Name and Address of the Person or Persons to Whom Distilled Spirits Were Sent, So That the Criminal Sanctions of Section 2857 May Be Lawfully Invoked if a False Entry of a Name and Address Is Made in That Record 13

Point III—A Regulation, Published in the Federal Register, Which Merely Announces a Form Number and Its Title and Directs That the Form Be "Kept," and States That "Entries Shall Be Made • • • as Indicated by the Headings on the Various Columns, and in Accordance With the Instructions Printed Thereon," and Does Not Contain Either a Facsimile of the Form, or a Statement of What the Headings Are, or What the "Instructions" Are, and the Form Itself Is Not Issued or Furnished to Users by the Government but Is to Be Pro-

Page

cured from Private Printers, Does Not "Prescribe" a Form, and Is Not a Regulation Which in Law "Prescribes" or Commands That a Daily Record Be Kept of the Names and Addresses of the Person or Persons to Whom Distilled Spirits Were Sent So as to Invoke the Criminal Sanction of Title 26 U.S.C.A. Section 2857 for Making a False Entry in a "Daily Record of Distilled Spirits Received and Disposed of" of Such Names and Addresses 15

Conclusion 22

Appendix A—Opinion of United States Court of Appeals for the Ninth Circuit 23

Appendix B—Statute Involved 34

Appendix C—Regulations Involved 36

Appendix D—Graphic Analysis of Statute Involved 43

Table of Authorities Cited

Pages

CASES

Arrow Distilleries, Inc. v. Alexander, Federal Alcohol Administrator, 7 Cir., 109 F.(2d) 397 19

Dixon v. U. S., 8 Cir., 116 F.(2d) 907 19

Helvering v. Superior Wines & Liquors, Inc., 8 Cir., 134 F.(2d) 373 19

M. Kraus & Bros. v. U. S., 327 U.S. 614 19

Pierce v. U. S., 314 U.S. 306, 311 12

Todd v. U. S., 158 U.S. 278, 282 ..... 12, 19

U. S. v. Eaton, 144 U.S. 677 19
U. S. v. George, 228 U.S. 14 ..... 14, 19
U. S. v. Lamson, 165 Fed. 80 20
U. S. v. Monarch Distributing Co., 7 Cir., 116 F.(2d) 11 19
U. S. v. Noveck, 271 U.S. 201, 204 ..... 12, 19
U. S. v. Resnick, 299 U.S. 207, 209 ..... 12, 19
U. S. v. Standard Brewery, 251 U.S. 210 19
U. S. v. United Verde Copper Co., 196 U.S. 207 14
U. S. v. Weitzel, 246 U.S. 533, 543 ..... 12, 19
U. S. v. Wiltberger, 18 U.S. 76, 95 ..... 12, 19

Viereck v. U. S., 318 U.S. 236 14

Waite v. Macy, 246 U.S. 606 14
Williamson v. U. S., 207 U.S. 425 14

STATUTES

Act of June 26, 1936, Chapter 830, Title IV, Sec. 411, 49 Stat. 1962 17

Title 5 U.S.C.A. Section 1001-1011 18

Title 26 U.S.C.A. Section 2857 ..... Cited throughout

Title 28 U.S.C.A. Section 1254 4

Title 44 U.S.C.A. Section 301-314 17

Pages

RULES AND REGULATIONS

Code of Federal Regulations, Title 26, Section 140.24 21

Code of Federal Regulations, Title 26, Section 151.185 20

Code of Federal Regulations, Title 26, Sections 194.75 to 194.81 inclusive ..... Cited throughout

Code of Federal Regulations, Title 26, Section 300.20 21

Code of Federal Regulations, Title 26, Section 310.42 20

Code of Federal Regulations, Title 26, Section 315.10 21

In the Supreme Court of the United States

OCTOBER TERM 1948

No. .....

EUGENE V. HENSLEY, JAMES W. HENSLEY, UNITED SALES COMPANY, a corporation, and UNITED DISTRIBUTORS, INC., a corporation,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable the Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Eugene V. Hensley, James W. Hensley, United Sales Company, a corporation, and United Distributors, Inc., a corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming judgments of conviction in this criminal cause.

STATEMENT

Your petitioners respectfully show and represent to the Court:

First: That on the 29th day of November, 1948, the United States Court of Appeals for the Ninth Circuit unanimously affirmed the judgments of conviction (R. 191),* which judgments had been entered in the District Court of the United States for the District of Arizona upon verdicts of a jury before Honorable Dave W. Ling, District Judge (R. 142-148).

Second: The indictment, filed November 6, 1947, contained 69 counts (R. 2 to 59). The first 68 were identical save as to the description of the then wholesale liquor dealer, the place of business, the names of the accused, the date of the offense, and the names and addresses on a certain "Form 52B" of the person or persons to whom distilled spirits were sent. Each of these 68 counts charged that certain of the petitioners (individual and corporate) specified therein, then being wholesale liquor dealers, as such were required to keep a record of distilled spirits disposed of by them on Form 52B prescribed by the Commissioner of Internal Revenue to be used for the purpose of indicating thereon, among other things, the name and address of the person or persons to whom distilled spirits were sent. These counts charged that in violation of Title 26 U.S.C.A. Section 2857, certain of the petitioners made false entries in Form 52B as to the name and address of person or persons to whom distilled liquors were sent.

Count 69, which was a conspiracy charge, accused petitioners of conspiring to violate Title 26 U.S.C.A. Section

*Transcript of the Record.

2857 by conspiring to make certain of the "false entries" in Forms 52B referred to in the various 68 counts above referred to, certain overt acts related thereto being alleged.

Some of the counts were dismissed on motion of the prosecution; one defendant was acquitted on all counts; and petitioners herein were convicted on certain others, and sentenced thereon as follows:

Eugene V. Hensley, convicted on 23 substantive counts and conspiracy count, sentenced to imprisonment for one year and a fine of $2,000.00 on each count, sentences to run concurrently (R. 142-143).

James W. Hensley, convicted on 8 substantive counts and conspiracy count, sentenced to imprisonment for six months and a fine of $2,000.00 on each count, sentences to run concurrently (R. 144-145).

United Sales Company, a corporation, convicted on 4 substantive counts and conspiracy count, sentenced to a fine of $2,000.00 on each count, sentences to run concurrently (R. 145-146).

United Distributors, Inc., a corporation, convicted on 3 substantive counts and conspiracy count, sentenced to a fine of $2,000.00 on each count, sentences to run concurrently (R. 146-147).

Third: From the onset of the trial, by motions to dismiss (R. 63-64, 117), by objections to the introduction of Form 52B in evidence (R. 66-67, 121-132), by motions to strike Form 52B in evidence (R. 94-96, 133-135), by motions for judgment of acquittal (R. 94-95, 135-137), all of which were timely made or renewed at the close of the

prosecution's case (R. 133-138) and renewed at the close of the whole case (R. 97, 138), and by timely motions in arrest of judgment (R. 112-115, 141-142), all of which were denied, petitioners challenged the sufficiency of the indictment, contending that each count of the indictment failed to state facts sufficient to constitute an offense against the United States.

Fourth: Petitioners duly and timely perfected their appeal to the Court of Appeals for the Ninth Circuit, which Court affirmed the judgments of conviction and the sentences (R. 191). No opinion was rendered by the District Court. The opinion of the Court of Appeals appears at the end of the Transcript of the Record herein, and is printed here in Appendix A.

Fifth: On application of petitioners, appellants below, the issuance of the mandate was stayed in order to afford petitioners opportunity to apply to this Court for a writ of certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C.A. Section 1254 (1), (formerly Section 240 (a) of the Judicial Code).

QUESTIONS PRESENTED

The basic question of whether the indictment states facts sufficient to constitute an offense against the United States, stems from these questions, all of which were argued in the Court of Appeals, viz.:

(1) Whether the false making of an entry indicating the name and address of the person or persons to whom dis-

tilled spirits were sent, in a "transcript" (i.e., in Form 52B), is a crime under Title 26 U.S.C.A. Section 2857.

(2) Whether Title 26 U.S.C.A. Section 2857 constitutionally delegates power to the Commissioner of Internal Revenue to promulgate a regulation, or prescribe a form, whereunder or whereby a wholesale liquor dealer must keep a record and make an entry therein indicating the name and address of the person or persons to whom distilled spirits were sent, so that the criminal sanction of Section 2857 may be lawfully invoked if a false entry of such name and address is made in that record.

(3) Whether pursuant to Title 26 U.S.C.A. Section 2857 the Commissioner of Internal Revenue, by Sections 194.75 to 194.81 inclusive of Title 26, Code of Federal Regulations, has in law promulgated a regulation or prescribed a form whereunder or whereby a wholesale liquor dealer is lawfully commanded to keep a record and make an entry therein indicating the name and address of the person or persons to whom distilled spirits were sent, so that the criminal sanction of Section 2857 may be lawfully invoked if a false entry of such name and address is made in that record, when the regulation invoked and published in the Federal Register merely announces a form number and its title, directs that it be "kept," and provides that entries be made by a wholesale liquor dealer in that form "as indicated by the headings of the various columns, and in accordance with instructions printed thereon," which regulation contains neither a facsimile of the form, nor a statement of its contents, nor the "instructions."

(4) Whether that portion of the regulations invoked, Section 194.75 (a) and (b) of Title 26, Code of Federal

Regulations, upon which the counts of the indictment are founded, is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.

By affirming the judgments of conviction of petitioners and by its opinion, the Court of Appeals decided that the answers to questions (1) to (3) inclusive is "yes" and the answer to question (4) is "no."

REASONS FOR GRANTING THE WRIT

In deciding the foregoing questions as it did, the United States Court of Appeals for the Ninth Circuit thereby decided: (1) important questions of federal law which have not been, but should be settled by this Court; and (2) federal questions in a way in conflict with applicable decisions of this Court.

The decision by the United States Court of Appeals for the Ninth Circuit, establishes as federal law the following propositions of far reaching importance:

(a) Where a statute requires a certain "record" be kept, and requires that a "transcript" of "such record" be rendered, and further proscribes the offense of making a false entry in "such record," but is silent as to the act of making false entries in the "transcript," then the making of a false entry in the "transcript" constitutes the making of a false entry in the "record" and is to be punished as the statute provides in the case of making false entries in the "record."

(b) Where a statute specifically defines the contents of a "record," administrative officials clothed with power to prescribe a form, may by regulation require that such "record" include additional data.

(c) Where a statute, which imposes criminal sanctions for making false entries in a certain record, authorizes an administrative official to "prescribe" a "form" for the record, the form is "prescribed" by publishing a regulation in the Federal Register which merely announces a form number and its title, and directs that it be "kept," and that what is to be entered in that form is "prescribed" by a regulation which merely states "entries shall be made * * * as indicated by the headings of the various columns, and in accordance with the instructions printed thereon," it not being necessary to the invocation of the criminal sanctions that either a facsimile of the form, or a statement of the headings on the form, or the "instructions" or the contents of the form be stated in the regulation, even in the case where the form is not furnished or issued by the Government, but must be procured from private printers.

It is respectfully submitted that the great importance of these questions in view of the constant growth and expansion of the use of rule making power by employees and officials in the executive branch of the Federal Government, to the business world, and the need of an authoritative and elucidating decision, is such as to call for an exercise of this Court's power to review the decision of the Court of Appeals for the Ninth Circuit.

For the sake of brevity the arguments addressed to the questions involved are omitted here but are covered by brief, next attached.

STATUTE AND REGULATIONS INVOLVED

The statute involved is Title 26 U.S.C.A. Section 2857, and is set forth in Appendix B. The regulations involved

are Sections 194.75 to 194.81 inclusive, Title 26, Code of Federal Regulations, and are set forth in Appendix C.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Ninth Circuit, directing that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings of said Court in the case entitled "Eugene V. Hensley, James W. Hensley, United Sales Company, a corporation, and United Distributors, Inc., a corporation, Appellants, vs. United States of America, Appellee," case number 11,921, decided November 29, 1948, and that the judgment of said Court be reviewed by this Court, as provided by law, and for such other relief as to this Court may seem proper.

Dated December 11, 1948.

Respectfully presented,

FRED A. IRONSIDE, JR.
810 Luhrs Tower
Phoenix, Arizona
Attorney for Petitioners

LOUIS B. WHITNEY
810 Luhrs Tower
Phoenix, Arizona
Of Counsel

In the Supreme Court of the United States

OCTOBER TERM 1948

No. .....

EUGENE V. HENSLEY, JAMES W. HENSLEY, UNITED SALES COMPANY, a corporation, and UNITED DISTRIBUTORS, INC., a corporation,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

Brief in Support of Petition for Certiorari

POINT I

The False Making of an Entry Indicating the Name and Address of the Person or Persons to Whom Distilled Spirits Were Sent, in a "Transcript," i.e., in Form 52B, Is Not a Crime Under Title 26 U.S.C.A. Section 2857.

Each count of the indictment is based upon the proposition that it is an offense punishable under Title 26 U.S.C.A. Section 2857 for a wholesale liquor dealer to make a false entry in Form 52B.

Section 2857 makes clear, positive and repeated distinction between the "record" (which the statute defines as a "daily * * * record of distilled spirits received and dis-

posed of") and the "transcripts" and "summaries" of that daily record.

Section 2857 makes utterly clear this distinction by its commands and its penal provisions. Two commands are given: (1) "keep daily * * * a record of distilled spirits received and disposed of," and (2) "render * * * transcripts and summaries of such records." To enforce command (1), neglect or refusal "to keep" the daily "record" is punishable by a fine of "not less than $100 nor more than $5000; *and*" imprisonment for "not less than three months nor more than three years." To enforce command (2), neglect or refusal "to render transcripts or summaries" is punishable by a fine of "not more than $100 for each such neglect or refusal."

The regulations invoked make the same distinction, viz:

> "Record 52, 'Wholesale Liquor Dealer's Record'," has two distinct parts, "Record 52, part 2" being the daily record of distilled spirits disposed of.
>
> "Forms 52A and 52B, 'Wholesale Liquor Dealer's Monthly Report'," are "monthly transcripts" of Record 52. Form 52B in evidence (109) states itself to be "Transcript of Record 52."
>
> "Form 338, 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B)'," is a summary of the "monthly transcripts."

The statute, after carefully establishing the distinction between the "daily * * * record" and the "transcripts and summaries," by precise choice proscribes the offense of making a false entry in the "daily record," which is "Record 52." No similar offense is proscribed as to the "transcripts, Forms 52A and 52B," or as to the "summaries," Form 338. As to the "transcripts" and "sum-

maries," Form 52A, Form 52B and Form 338, the only crime proscribed is that of refusal or neglect to render them, and petitioners were not charged with that crime. Petitioners were charged with making a false entry in Form 52B, the monthly "transcript," which is not denounced as a crime by the statute, as the graphic analysis in Appendix D hereof demonstrates.

Nevertheless, the District Court and the Court of Appeals erroneously proceeded as if the indictment had charged the making of false entries in "Record 52, part 2," even though the document relied upon by the indictment and the prosecution was an entirely different document, namely, Form 52B, the monthly transcript.

The fact that the terms "such records" and "records" are defined by the plain terms of the statute itself as the "daily * * * record of distilled spirits received and disposed of," escaped the notice of the Court of Appeals. In the context of Section 2857, these terms do not mean and cannot mean the monthly "transcripts" and monthly "summaries." Repeatedly the Court confused the various documents. For example, the Court held (R. 187): "the command of the regulations, supra, is that the dealer *shall keep a record Form 52B, and daily entries shall be made thereon* * * *." (Emphasis by the Court of Appeals, appearing in its published opinion, see page 30 of Appendix A). But the regulation states that the dealer "shall keep Record 52" and that "daily entries shall be made on Record 52." Form 52B, an entirely different document, is a "monthly transcript" which the regulation does not say "shall be kept" but shall be "rendered" monthly, and in which entries are not required to be made daily.

By its opinion the Court of Appeals has decided that where a statute requires a particular "record" be kept daily, and that a "transcript" of "such record" be rendered monthly, and further interdicts the making of a false entry in the daily "record" but is silent as to the act of making a false entry in the monthly "transcript," that nevertheless the making of a false entry in the "transcript" constitutes the crime of making a false entry in the "record," which is to be punished as the statute provides in the case of making a false entry in the "record."

It is respectfully submitted that thereby the Court of Appeals has laid down a principle which, if sanctioned by this Court, will constitute a basic and radical departure from the fundamental rule that a criminal statute may not be expanded by an indictment or by judicial construction so as to establish as a crime, that which Congress has not clearly and plainly specified as an offense. *Pierce v. U. S.*, 314 U.S. 306, 311; *U. S. v. Noveck*, 271 U.S. 201, 204; *Todd v. U. S.*, 158 U.S. 278, 282; *U. S. v. Wiltberger*, 18 U.S. 76, 95; *U. S. v. Weitzel*, 246 U.S. 533, 543; *U. S. v. Resnick*, 299 U.S. 207, 209.

POINT II

Title 26 U.S.C.A Section 2857 Does Not Constitutionally Empower, or Delegate Power to, the Commissioner of Internal Revenue to Promulgate a Regulation, or Prescribe a Form, Whereunder or Whereby a Wholesale Liquor Dealer Must Keep a Record and Make an Entry Therein Indicating the Name and Address of the Person or Persons to Whom Distilled Spirits were Sent, so That the Criminal Sanctions of Section 2857 May Be Lawfully Invoked if a False Entry of a Name and Address Is Made in That Record.

Assuming that the indictment had charged the making of false entries in "Record 52, part 2," the daily "record," (and not as it did in Form 52B, the "transcript"), nevertheless Section 2857 does not constitutionally empower the Commissioner to require by prescribing a form or regulation that an entry be made in the daily record of names and addresses.

The command of the statute is to "keep daily * * * a record of distilled spirits received and disposed of." Fairly read, the command is to make two entries, one, spirits received, the other, spirits disposed of; *it requires only that a dealer shall sum up in writing each day the quantity of spirits received and the quantity disposed of.* Nevertheless, the Court of Appeals held that as the statute empowered the Commissioner to "prescribe" the "form" of the "record of distilled spirits," that the Commissioner was thereby empowered to require that this "record" also contain entries of the names and addresses of the person or persons to whom distilled spirits were sent.

It is respectfully submitted that the statute having specified that the daily record be "of distilled spirits," the Commissioner is without power to expand the record

so as to compel the making of entries of names and addresses, which entries, if falsely made, constitute the crime of making false entries in a record of distilled spirits.

Here the statute fairly read does not demand the disclosure of names and addresses, nor does it empower the Commissioner *carte blanche* to demand, on pain of criminal prosecution, whatever he may choose to wish to know of the customers of a dealer in spirits. If under the statute the Commissioner may demand the "names and addresses of the person or persons to whom distilled spirits were sent," query: May he not require that person's phone number, his home address, etc., indeed, why not his political affiliations, for such demands differ neither in principle nor logic. On the principle laid down by the Court of Appeals, the subject to be reported is not "distilled spirits" but rather information desired by the Commissioner concerning the customers of a dealer in spirits.

It is submitted that the decision of the Court of Appeals in this respect is in conflict with applicable decisions of this Court, especially the principles decided in *U. S. v. George,* 228 U.S. 14; *U. S. v. United Verde Copper Co.,* 196 U.S. 207; *Waite v. Macy,* 246 U.S. 606; *Williamson v. U. S.,* 207 U.S. 425; *Viereck v. U. S.,* 318 U.S. 236.

POINT III

A Regulation, Published in the Federal Register, Which Merely Announces a Form Number and Its Title and Directs That the Form Be "Kept," and States That "Entries Shall Be Made . . . as Indicated by the Headings on the Various Columns, and in Accordance with the Instructions Printed Thereon," and Does Not Contain Either a Facsimile of the Form, or a Statement of What the Headings Are, or What the "Instructions" Are, and the Form Itself Is Not Issued or Furnished to Users by the Government but Is to Be Procured from Private Printers, Does Not "Prescribe" a Form, and Is Not a Regulation Which in Law "Prescribes" or Commands That a Daily Record Be Kept of the Names and Addresses of the Person or Persons to Whom Distilled Spirits Were Sent so as to Invoke the Criminal Sanction of Title 26 U.S.C.A. Section 2857 for Making a False Entry in a "Daily Record of Distilled Spirits Received and Disposed of" of Such Names and Addresses.

Section 2857 does not in terms require that entries be made either in the "daily record" or in the "transcripts" indicating the name and address of the person or persons to whom distilled spirits were sent.

The pertinent part of regulations invoked (Sections 194.75, Title 26, C.F.R., Supplement 1940, Titles 21-29, Book 2, pages 3001-3003) merely states that a wholesale liquor dealer,

> "shall keep Record 52, 'Wholesale Liquor Dealer's Record' and render monthly transcripts, Forms 52A and 52B 'Wholesale Liquor Dealer's Monthly Report,' and Form 338 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B)' * * *. Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings on the various columns and in accordance with the instructions printed thereon * * *."

Neither the daily record, "Record 52," nor the monthly transcripts Forms 52A and 52B, nor the monthly summary Form 338 are furnished or issued by the Government; all must be procured from private printers. The regulations invoked do not contain a facsimile of either part 1 or part 2 of Record 52, or a facsimile of Forms 52A and 52B or Form 338. The regulations invoked do not state how many "columns" there are to be on any of these five documents, nor do they state what "the headings of the various columns" are. Nor are the "instructions printed thereon" specified in the regulations.

The vice of the matter is thrown in sharp relief when Form 52B (109) is laid against the regulation to see whether or not the Form 52B upon which the indictment was predicated, squares with it. It then becomes obvious that as the regulation does not specify what are the "entries," "columns," "headings" or "the instructions printed thereon," therefore, it cannot be ascertained from the regulation whether the "entries," "columns," "headings" or "the instructions printed thereon" are those commanded by the regulations. The regulation provides nothing with which to compare Form 52B. Nor is it possible to ascertain from the statute or the regulations whether "Charles R. Hadley Co., Pathfinders," the printer of the Form 52B in question, has in fact accurately printed the "columns," "headings," and "instructions," concerning which both the statute and regulations are silent.

Under the regulation, the "columns," "headings" and "instructions" could be changed, altered or enlarged a hundred times by a dozen departmental employees and

there would be no reflection of them in either the statute or regulation. Neither the existence nor absence of intentional changes by subordinate departmental employees, or inadvertent changes due to printer's errors, can be ascertained from the statute or regulation.

Nevertheless, in these circumstances the Court of Appeals decided that by this regulation the "Commissioner 'prescribed' and promulgated" a requirement that "daily entries" be made in Form 52B of the name and address of the person or persons to whom distilled spirits were sent, and that thereby, making a false entry as to such name and address, constitutes a crime under Section 2857.

No case has been found where criminal liability is made to depend upon unspecified headings on undefined columns of a form which itself is not delineated in the statute or regulation.

More important is this: Title 26 U.S.C.A. Section 2857 was enacted by the Act of June 26, 1936 (Chapter 830, Title IV, Section 411, 49 Stat. 1962-1963). About a year *earlier* Congress enacted the Federal Register Act (44 U.S.C.A. Section 301-314) which by Section 305 required the publication of the regulation invoked in the Federal Register, and by Section 311 required a "complete codification of all documents which, in the opinion of the agency, have general applicability and legal effect, and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities on June 1, 1938."

Subsequently, to be effective September 11, 1946, Con-

gress enacted the Administrative Procedure Act (Title 5 U.S.C.A. Section 1001-1011), which by Section 1002 required the publication in the Federal Register of the "forms and instructions * * * of all * * * reports" and "substantive rules" of each Federal agency.

The indictment was returned November 6, 1947. All of the counts are predicated upon making false entries in Form 52B during the period April 1945 to January 31, 1947, all subsequent to the enactment of the Federal Register Act. All of the substantive counts involving petitioners James W. Hensley, United Sales Company, and United Distributors are predicated upon the making of false entries in Form 52B subsequent to September 1946, which is subsequent to the effective dates of both the Federal Register Act and the Administrative Procedure Act.

In the face of these Acts, to decide that criminal sanctions may be imposed for making a false entry in a form, which itself, its "columns" and "headings," its "instructions," are not delineated or spelled out in the statute or in the regulation, is to authorize and approve administrative practices which manifestly these Acts were designed to prohibit. By these means the obvious and basic purpose of these Acts is entirely circumvented. Under the opinion of the Court of Appeals, administrative officials need not spell out in regulations published in the Federal Register the information required of citizens or the duties to which citizens shall be subjected.

We respectfully submit that the principles of constitutional law and administrative law established by the Court of Appeals in the opinion at bar, and the cases from the

Eighth and Seventh Circuits* which the Court of Appeals in its opinion implies it is following, are dangerous departures from the settled jurisprudence of the Supreme Court, and are in conflict with applicable decisions of this Court, especially the principles decided in *U. S. v. George*, 228 U.S. 14; *U. S. v. Eaton*, 144 U.S. 677; *Todd v. U. S.*, 158 U.S. 278; *U. S. v. Noveck*, 271 U.S. 201; *U. S. v. Wiltberger*, 18 U.S. 76; *U. S. v. Weitzel*, 246 U.S. 533; *U. S. v. Resnick*, 299 U.S. 207; *M. Kraus & Bros. v. U. S.*, 327 U.S. 614; *U. S. v. Standard Brewery*, 251 U.S. 210.

Careful search has not revealed to counsel a decision of this Court defining the essential acts and requisites which in legal contemplation constitute "prescribing" or "promulgating" a form or report. Heretofore it has appeared that "to prescribe" a form or "to prescribe" a report (which is not printed or issued by the Government), required publication in a regulation of a facsimile of it, or at the very least required that its contents be described in detail in the regulation.†

**Dixon v. U. S.*, 8 Cir., 116 F.(2d) 907; *Helvering v. Superior Wines & Liquors, Inc.*, 8 Cir., 134 F.(2d) 373; *Arrow Distilleries, Inc. v. Alexander, Federal Alcohol Administrator*, 7 Cir., 109 F. (2d) 397; *U. S. v. Monarch Distributing Co.*, 7 Cir., 116 F.(2d) 11. It is respectfully submitted that a fair reading of these cases will disclose that the points here at bar were neither raised nor passed upon. Each of the cases begs the questions at bar, the Courts assuming, without deciding, the very questions here involved. The Court of Appeals for the Ninth Circuit we feel made similar assumptions, for example, it held that Form 52B was "prescribed and promulgated." How could the Court of Appeals glean from the regulation that the Form 52B, on which the indictment was based, was the Form 52B which was "prescribed"? Query: By what medium was it "prescribed"; by whom and when was it "prescribed," and where can it be seen?*

†Compare the Commissioner's regulations at bar with the Commissioner's oleomargarine regulations of about 1892 cited in *U. S. v. Eaton*, 144 U.S. 677: "Wholesale dealers in oleomar-

In view of the Federal Register Act and the Administrative Procedure Act, it would seem to follow that either a facsimile of the form or a clear description of its contents must be published in the Federal Register before the form can be said to "be prescribed" so as to constitute a legal predicate for a criminal prosecution, especially when the form is not issued to users by the Government, but is to be procured from private printers.*

Nevertheless, the opinion of the Court of Appeals is to the contrary. Its decision now stands as final authority for this proposition: In a criminal case there is a sufficient

---

garine will keep a book (form 61) and make a monthly return on form 217, showing the oleomargarine received by them, and from whom received; also the oleomargarine disposed of by them, and to whom sold or delivered." Note those of about 1902, cited in *U. S. v. Lamson*, 165 Fed. 80: "Wholesale dealers will make monthly returns on form 217 (with inside sheets when needed to complete detailed statements) showing in detail the number of packages and number of pounds of oleomargarine received from the manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or consigned • • •." Note those published in the Federal Register, Section 310.42, Title 26 C.R.F.: "(b) Items. The record must show: (1) The number of pounds in each consignment of oleomargarine received, the name and address of the consignor, and the date of receipt. (2) The number of pounds in each lot disposed of, the name of the consignee, the address to which delivered, and the date of shipment."

*Compare the Commissioner's regulations at bar with the Commissioner's narcotic regulations published in the Federal Register, Section 151.185, Title 26 C.F.R.:

"Records required. Every manufacturer, producer, compounder, or vendor (including dispensing physician), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, the date upon which delivery to the registrant, his agent, or a carrier is made. The record of dispositions to consumers shall show the

predicate for punishing the making of a false entry under a "heading" by the publication in the Federal Register of a regulation which announces a form number and its title and directs that it be "kept," even though the regulation is silent as to headings or contents of the form, it being sufficient that the regulation state that entries be made "as indicated by the headings on the various columns, and in accordance with instructions printed thereon"; such a regulation constituting in law a sufficient "prescribing" of the form so that citizens are bound to enter in that form whatever may be "indicated by the headings," it not being necessary to "prescribing"

---

name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

"Forms are not furnished for the keeping of these records, but the record shall be in the following form:

"FORM OF RECORD OF DISPOSITIONS TO REGISTRANTS

Date	Registration no. of recipient	Name of recipient	Address	Name of preparation	Quantity

"FORM OF RECORD OF DISPOSITIONS TO CONSUMERS

Date	Name of recipient	Address	Name of preparation	Quantity
				"

See also for comparison with the regulations at bar: Section 140.24, Title 26 C.F.R., "Form 774, tobacco invoice or notice of shipment; description and purpose"; Section 300.20, Title 26, C.F.R., "Daily records: Form 662" manufacturers of white phosphorous matches; Section 315.10, Title 26, C.F.R., "Records" acquisition and disposal of firearms by manufacturers and dealers.

that either the form itself, its "headings," its "columns" or its "instructions" or its contents be set forth in the regulation and published in the Federal Register or that the form be issued to users by the Government.

The establishment of such a proposition of law, the enactment of Federal Register Act and the Administrative Procedure Act, the extent and continuing growth of the use of rule making power by employees and officers in the executive branch of the Federal Government, and the absence of a decision by this Court laying down the requisites of "prescribing" or "promulgating," are, we believe, compelling circumstances calling for an exercise of this Court's power to review the decision of the Court of Appeals.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the petition for the writ should be granted because the fundamental questions involved in this application are of such grave public importance as to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

FRED A. IRONSIDE, JR.
810 Luhrs Tower
Phoenix, Arizona
Attorney for Petitioners

LOUIS B. WHITNEY
810 Luhrs Tower
Phoenix, Arizona
Of Counsel

(Appendices follow)

APPENDIX A

In the United States Court of Appeals
For the Ninth Circuit

Eugene V. Hensley, James W. Hensley, United Sales Company, a corporation and United Distributors, Inc., a corporation, *Appellants,* vs. United States of America, *Appellee.*	No. 11,921 Nov. 29, 1948

OPINION

Upon Appeals from the District Court of the United States for the District of Arizona

Before: Healy, Bone and Orr, Circuit Judges

Bone, Circuit Judge.

Appellants, who were wholesale liquor dealers, appeal from a judgment of conviction upon the verdict of a jury under an indictment[1] containing 69 counts. The first 68 were identical save as to the description of the then wholesale liquor dealer, the place of business, the names of the

[1]The indictment bore the following caption:
"Violations: 26 U.S.C.A. 2857 (Make false entries in records of wholesale liquor dealer); 18 U.S.C.A. 88 (Conspiracy to commit offenses against the United States of America in violation of 26 U.S.C.A. 2857)."

accused, the date of the offense, and the names and addresses on a certain "Form 52-B" of the person or persons to whom distilled spirits were sent.

Each of these 68 counts charged that certain appellants (individual and/or corporate) specified therein, then being wholesale liquor dealers operating under basic permits, as such were required to keep a record of distilled spirits disposed of by them on Form 52-B prescribed by the Commissioner of Internal Revenue to be used for the purpose of indicating thereon, among other things, the name and address of the person or persons to whom distilled spirits were sent. These counts charged that in violation of Title 26, U.S.C.A. Section 2857 certain of the appellants made false entries in Form 52-B as to the name and address of person or persons to whom distilled liquors were sent by the appellants named in each count. Counts 1 and 2 are typical examples of the general form and scope of each of the first 68 counts, charging substantive offenses.[2]

---

[2] "Count I.

(26 U.S.C.A. 2857)

"1. That at all times herein mentioned, Eugene V. Hensley and James O. Cox, defendants, and one Kemper Marley, were co-partners engaged in the trade or business of wholesale liquor dealers at Phoenix, Arizona, under a basic permit and special tax stamp, in the firm name and style of the United Sales Company, selling and offering for sale distilled spirits in quantities of five wine gallons or more to the same persons at the same time; that as such said wholesale liquor dealers they were required to keep daily, at their place of business, covered by their special tax stamp, a record of distilled spirits disposed of by them on a form prescribed by the Commissioner, to wit, form 52-B, to be used by licensed wholesale liquor dealers for the purpose of indicating, among other things, the name and address of the person or persons to whom distilled spirits were sent.

"2. That the said defendants, Eugene V. Hensley and James O. Cox, did, on or about the 14th day of April, 1945, in said state and district of Arizona, in violation of Title 26, U.S.C.A. 2857, unlawfully and wilfully make a false entry in and upon a said

Each of these first 68 counts against individual and/or corporate defendants is brought into direct relationship to Form 52-B, by a general preliminary charge therein that the defendant or defendants named therein were required to keep a record of distilled spirits disposed of by them on this Form 52-B, such "record" being for the purpose of indicating (among other matters) the name and address of the person or persons to whom distilled spirits were sent. (See type of allegation in paragraph 1 of Count I, footnote 2.)

All appellants were found guilty on count 69 which was a conspiracy charge. It accused appellants of conspiring to make certain of the "false entries" referred to in the

---

form 52-B, by then and there unlawfully entering thereon that on the 14th day of April, 1945, certain distilled spirits, to wit, one case Joe E. Seagram & Sons, Inc. Imp. Can. and one case Hiram Walker & Sons, Inc. R-820 Cal. had been sent by United Sales Company, to Brown's Pharmacy, Phoenix, Arizona, when in fact, the above and foregoing described distilled spirits had not been sent to Brown's Pharmacy, but had been disposed of by the said United Sales Company to a person or persons other than the said Brown's Pharmacy, whose name or names and address or addresses are unknown to the Grand Jurors.

"Count II.

"1. That all the allegations of paragraph 1, of Count I of this indictment are incorporated in and made a part of this Count by reference as fully as if same were herein fully set forth.

"2. That the said defendants, Eugene V. Hensley and James O. Cox, did, on or about the 14th day of April, 1945, in said State and District of Arizona, in violation of Title 26 U.S.C.A. 2857, unlawfully and wilfully make a false entry in and upon a said form 52-B, by then and there unlawfully entering thereon that on the 14th day of April, 1945, certain distilled spirits, to wit, two cases Hiram Walker & Sons, Inc. Imp. Can. had been sent by the United Sales Company, to the Elks' Club, Phoenix, Arizona, when in fact, the above and foregoing described distilled spirits had not been sent to the Elks' Club, but had been disposed of by the said United Sales Company to a person or persons other than the said Elks' Club, whose name or names and address or addresses are unknown to the Grand Jurors."

various 68 counts above referred to, certain overt acts related thereto being alleged. Some of the counts were dismissed on motion of appellee; one defendant was acquitted on all counts and appellants convicted on certain others. These convictions result in this appeal.

Appellants do not question the sufficiency of the evidence with respect to any of the counts upon which they were respectively found guilty. Their contentions in this court present only questions of law relating to the cited statute, and the scope and general effect of the regulations promulgated thereunder.

The pertinent language of the statute (Section 2857, supra) is as follows:

> "(a) Requirements. Every * * * wholesale liquor dealer who sells, or offers for sale, distilled spirits * * * *shall keep daily,* at his place of business * * * a record of distilled spirits *received and disposed of by him,* and shall render under oath correct transcripts and summaries of such records, * * *. The records shall be kept * * * *in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.*
>
> "The records required to be kept under the provisions of this section and the regulations issued pursuant thereto, shall be preserved for a period of four years, and * * * shall be available * * * for inspection.
>
> "Every * * * wholesale liquor dealer who refuses or neglects to keep such records *in the form prescribed by the Commissioner,* with the approval of the Secretary, or to make entries therein, * * * *or makes any false entry therein,* * * *" (Emphasis ours)

Penalty provisions appear in the section.

Certain regulations were promulgated by the Commissioner pursuant to Section 2857 referred to in the caption of the indictment and upon which the indictment is asserted to be predicated, i.e., Sections 194.75 to 194.81 inclusive of Title 26, Code of Federal Regulations, the pertinent provisions of which are as follows:

> "194.75 Records to be kept by wholesale liquor dealers. (a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, 'Wholesale Liquor Dealer's Record,' and render monthly transcripts, Forms 52A and 52B, 'Wholesale Liquor Dealer's Monthly Report,' and Form 338, 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B).'
>
> "(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with the instructions printed thereon * * *."

Pursuant to the statutory authority above quoted, the Commissioner, by regulations above referred to, "prescribed" and promulgated the official record "form" to be used by wholesale liquor dealers, that form being 52-B here involved. It is printed with ruled column spaces in which certain information is to be entered by the wholesale liquor dealer consisting, (among other data) of the names and addresses of person or persons to whom distilled spirits were sent, and the date of the sending, the kind and quantity of the distilled spirits so sent and the

name of the distiller or rectifier of the said spirits. The said information so required in the form is indicated by the caption at the head of one of the columns, the directive reading "to whom sent * * * name * * * address."

Appellants specify numerous errors at the trial, all of which we have considered. In essence these claims of error are contentions which may be summarized as follows:

A

Section 2857 plainly prescribes that a wholesale liquor dealer keep "a record of distilled spirits received and disposed of by him"; *it does not prescribe that such a dealer keep "a record of the names and addresses of the person or persons to whom distilled spirits were sent." The Commissioner is only authorized, by this statute, to prescribe the "form", that is to say, "the physical arrangement" in which the "record of distilled spirits received and disposed of" shall be kept.*

B

Under Section 2857 there is no such crime as that charged in the indictment. Before 1936 the statute specifically required the wholesale dealer to "provide * * * a book, to be prepared and kept in such form as may be prescribed by the Commissioner of Internal Revenue, and shall, * * * *enter in such book,* * * * the name and place of business of the person or firm to whom such spirits are to be sent," and if the dealer did "make any false entry" it was a crime. This entry was specifically eliminated by the 1936 amendment *and the present statute does not even mention, let alone require, that entry. Neither does the present statute make it a crime to violate a regulation of*

the Commissioner. Here the Commissioner did not confine himself *to that which the statute required—he purports to add a requirement not in the statute.*

C

Section 2857 does not constitutionally empower or constitutionally delegate power to the Commissioner alone, or with the approval of the Secretary, to promulgate a regulation requiring the use of a form, or prescribe a form, wherein wholesale liquor dealers *must* by an entry indicate the name and address of the person or persons to whom distilled spirits were sent (as in Form 52-B). For this reason the statute does not support convictions on the instant indictment which charges the making of false entries on Form 52-B respecting the names and addresses of those to whom distilled spirits were sent by appellants.

D

The regulations themselves do not *require* wholesale liquor dealers to make entries on Form 52-B showing such names and addresses; furthermore, the quoted regulations and the portion of said Section 2857 upon which the indictment is founded are unconstitutional and lacking in due process *in that* this portion of the statute, and the regulations, set up no ascertainable and immutable standard of guilt.[3]

Appellants contend that the holdings in and logic of such cases as United States v. Eaton, 144 U.S. 677; United States v. Grimaud, 220 U.S. 506, and Viereck v. United

[3]Appellants presented the substance of these contentions in argument on motions in the lower court to strike certain exhibits and for judgment of acquittal.

States, 318 U.S. 236 support their contentions above outlined. We do not agree.

It will be noted that the command of the regulations, supra, is that the dealer *shall keep a record Form 52-B, and daily entries shall be made thereon "of all distilled spirits received and disposed of" as indicated by the headings of the various columns.* It is too clear for dispute that the italicized words specifically require the wholesale liquor dealer to observe and follow the requirements indicated in "the headings" of the various columns on Form 52-B. By the plain and simple directive in the quoted regulations, these column "headings" are thereby made an integral part of Form 52-B and as completely binding on appellants as the requirement about "daily entries." If this were not the case the words "as indicated by the headings of the various columns" would be utterly meaningless and would have to be read out of the regulation by this court. The argument that the regulation does not command a wholesale liquor dealer to make entries indicating the name and address, etc. is wholly lacking in persuasive force.

We reach the same conclusion respecting the argument that there is no requirement in the statute that a record of names and addresses be kept. Appellants assert that the statute (Section 2857) does not empower the Commissioner to *require* a record of names and addresses of those to whom distilled spirits are sent. The statute itself answers this contention. It specifically authorizes the Commissioner to require just such liquor records. In simple language it prescribes that "every * * * wholesale liquor dealer who refuses or neglects *to keep such records in the form prescribed by the Commissioner, * * * or makes any false*

entry therein, * * * shall pay a penalty * * * and, on conviction, shall be fined * * * and be imprisoned * * *." (Emphasis ours) Under such plain and unambiguous statutory authority we do not doubt the power of the Commissioner to prescribe by regulations the *form* of the report record for such liquor wholesalers, and by such regulations require that this particular official report record or "form" contain information of the precise character called for in "headings" of the various columns of such form. These "headings" are far more than a meaningless "physical arrangement"—a characterization given them by appellants. To the contrary they are an essential part of this important official report which is so "formed" as to indicate on its face exactly what facts are required to be entered in the various columns. The use and existence of these "headings," and the important function assigned to them, finds ample sanction in Section 2857.

In prescribing this entire form the Commissioner did not transcend his powers for these powers derive directly from the statute. Thus having power lawfully to require the sought for information, he had power to require it to be set forth in a certain way *in a form prescribed by him.* It follows that if a wholesaler is required to report such information on such a form and deliberately sets forth false information concerning the required facts, he offends against the Federal law and the regulations. It cannot be said that the law (as here) may require certain important and pertinent information to be entered on a prescribed form for the use of a public official in aid of law enforcement, but must tolerate such information when it is false.

We are of the view that the substantial issues posed on this appeal find their answers in such cases as Dixon v. United States, 8-Cir., 116 F.2d 907; Helvering v. Superior Wines & Liquors, Inc., 8-Cir., 134 F.2d 373; Arrow Distilleries, Inc. v. Alexander, Federal Alcohol Administrator, 7-Cir., 109 F.2d 397; United States v. Monarch Distributing Co., 7-Cir., 116 F.2d 11. See also United States v. McDermott, 7-Cir., 131 F.2d 313.

We hold that the provisions of the (cited) regulations were clearly authorized by the (cited) statute, and that the trial court properly permitted their application to the facts in this case under the charge set forth in the indictment. The offenses charged in the indictment therefore violated both the statute and the regulations. Form 52-B merely requires that certain information be set forth therein respecting commonplace business operations, and in this connection, it is to be remembered that we are here dealing with a federally regulated business. It is obvious, and the regulations so indicate, that the Commissioner regarded the particular information here sought as necessary and essential to an efficient enforcement of federal liquor laws, and there is absent a rational reason for condemning the regulations on the theory that they require procedural formalities which are unreasonable, capricious and arbitrary. We think that the regulations merely apply sound administrative practice to transactions of the character here involved.

Appellants' contentions in this case fall far short of achieving the dignity of a constitutional issue. The instant statute and regulations set up a clearly ascertainable standard of guilt and are not tainted with the constitutional infirmities charged by appellants.

The Judgment and Sentences are affirmed.

(Endorsed:) Opinion. Filed Nov. 29, 1948. Paul P. O'Brien, Clerk.

(Note: Emphasis throughout appearing in published opinion.)

APPENDIX B

THE STATUTE

Title 26, Section 2857, U.S.C.

"2857. Books of rectifiers and wholesale dealers.

"(a) Requirements. Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided,* That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

"The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

"Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records,

or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

"Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal."

APPENDIX C

THE REGULATIONS

Section 194.75 to 194.81 inclusive, Title 26 Code of Federal Regulations; Supplement 1940, Titles 21-29, Book 2, Code of Federal Regulations of the United States of America, pages 3001-3003.

"194.75 *Records to be kept by wholesale liquor dealers.* (a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, 'Wholesale Liquor Dealer's Record,' and render monthly transcripts, Forms 52A and 52B, 'Wholesale Liquor Dealer's Monthly Report,' and Form 338, 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B).'

"(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with the instructions printed thereon, not later than the close of business of the day on which the transactions occur: *Provided,* That if the keeping of such separate record is approved by the district supervisor, a wholesale liquor dealer may keep a separate record, such as invoices, of the removal of distilled spirits, showing the removal data required to be entered on Record 52, but the daily entries of the removal of distilled spirits from his premises shall be made on Record 52 not later than the close of business of the following business day.

"(c) A dealer who sells wines or malt liquors, or both, in wholesale quantities, and who sells distilled spirits in retail quantities, is not required to keep Record 52 or to

file monthly transcripts, Forms 52A and 52B, and report, Form 338.

"(d) Wholesale liquor dealers who sell wines and malt liquors only, and wholesale malt liquor dealers are not required to keep Record 52 or to file monthly transcripts, Forms 52A and 52B, and report, Form 338† (I.R.C. 2857, 2858, 53 Stat. 327, 328; 26 U.S.C., Sup., 2857, 2858).

"194.76. *Separate record of serial numbers of cases.* Serial numbers of cases of distilled spirits disposed of need not be entered on Record 52, provided the proprietor keeps at his place of business a separate record, showing such serial numbers, with necessary identifying data, including the date of removal and the name and address of the consignee, provided the keeping of such record is approved by the district supervisor. Such separate record may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills. Such books, invoices, and bills shall be preserved for a period of 4 years and in such manner that the required information may be ascertained readily therefrom, and, during such period, shall be available during business hours for inspection and the taking of abstracts therefrom by revenue officers. If a record in book form is kept, entries shall be made on such separate approved record not later than the close of business of the day on which the transactions occur. The dealer shall note in Record 52, in the column for reporting serial numbers of spirits disposed of, 'Serial numbers shown on commercial records per authority, dated .....† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857).

"194.77. *Entry of miscellaneous items.* Wholesale liquor dealers may enter on Record 52 as one item the total quantity of different kinds of spirits made up from broken cases sold to the same person on the same day, provided such total quantity is not in excess of 10 gallons. The entry of such items shall be stated as 'Miscellaneous' or 'Misc.' and shall show the date, the name and address of the person to whom sold, and the quantity. The total quantity of such miscellaneous spirits so disposed of during the month shall be reported in the monthly summary, Form 338, as 'Miscellaneous': *Provided,* That the wholesale liquor dealer determines by actual inventory the quantity of each kind of spirits remaining on hand at the end of the month.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

"194.78. *Place where Record 52 shall be kept.* (a) Except as provided in paragraph (b), the wholesale liquor dealer shall keep Record 52 at the place of business covered by his wholesale liquor dealer special tax stamp, if spirits are received and sent out from such premises.

"(b) If the place of business covered by the wholesale liquor dealer special tax stamp is not the same premises where the spirits are received and sent out, the wholesale liquor dealer shall keep his Record 52 at the latter place and render transcripts from such place on Forms 52A and 52B and summary report on Form 338: *Provided,* That, if approved by the district supervisor, a wholesale liquor dealer may keep his Record 52 at the place of business covered by the special tax stamp and render transcripts on Forms 52A and 52B and summary report on Form 338 from such place. If, however, the place of busi-

ness covered by the special tax stamp is not in the same supervisory district as the place where the spirits are received and sent out, Record 52 must be kept at the latter place and transcripts on Forms 52A and 52B and summary report on Form 338 rendered to the district supervisor of that district.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857).

"194.79. *Wholesale liquor dealer maintaining a retail department.* (a) A wholesale liquor dealer who sells distilled spirits at wholesale and at the same premises sells distilled spirits at retail in his capacity as a retail dealer in liquors, and who maintains a separate retail department, shall keep Record 52 at his wholesale department of all distilled spirits there received and disposed of. Distilled spirits transferred from the wholesale department to the retail department shall be reported on Record 52, part 2, as 'Transferred to Retail Department.' Where it is necessary in the filling of a wholesale order to take liquor out of the retail department, the quantity removed from the retail department must be shown on Record 52, part 1, as 'Transferred from Retail Department,' and the entire sale shown in Record 52, part 2, as a disposal.

"(b) The retail department need not be maintained in a separate room or be partitioned off from the wholesale department, but the retail department must in fact be separate from the wholesale department.

"(c) Where a wholesale liquor dealer sells at both wholesale and retail, and does not maintain a separate retail department, all distilled spirits received and disposed of shall be entered on Record 52.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

"194.80. *Monthly reports.* (a) A wholesale liquor dealer shall file transcripts of Record 52 on Forms 52A and 52B, and a summary report on Form 338, with the district supervisor, on or before the tenth day of the succeeding month. Record 52 shall be preserved for a period of 4 years and, during such period shall be available during business hours for inspection and the taking of abstracts therefrom by any internal revenue officer.

"(b) If there be no receipts and disposals of distilled spirits by a wholesale liquor dealer, during any month, it will be necessary to forward monthly summary on Form 338 only to the district supervisor, showing the quantity on hand the first day of the month and the quantity on hand the last day of the month and marked 'No transactions during month.'

"When a wholesale liquor dealer discontinues business as such, he shall render monthly reports, Forms 52A and 52B and the summary report on Form 338, covering transactions for the month in which business is discontinued, and mark such reports 'Final.' Record 52 shall be preserved by the dealer for a period of 4 years thereafter.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

"194.81. *Forms to be provided by users at own expense.* Record 52, Forms 52A, 52B, and 338 will be provided by users at their own expense, but must be in the form prescribed by the Commissioner: *Provided,* That, with the approval of the Commissioner, they may be modified to adapt their use to tabulating or other mechanical equipment: *Provided further,* That where the form is printed in book form, including loose-leaf books, the in-

structions may be printed on the cover or the fly leaf of the book instead of on the individual form.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

---

†"For source citation, see note to Sec. 194.1." The note to Section 194.1 is as follows: "The source of Secs. 194.1 to 194.96, inclusive, is Regulation 20, Secretary of the Treasury, June 6, 1940, effective on and after the sixtieth day; 5 FR 2170." (Page 2986, Supplement 1940, Titles 21-29, Book 2, Code of Federal Regulations of the United States of America.)

APPENDIX D - ANALYSIS OF STATUTE

Showing that crime "makes any false entry therein" does not apply to monthly "transcript" Form 52B

Title 26, Section 2857, U.S.C.

"2857. Books of rectifiers and wholesale dealers.

"(a) Requirements. Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided*, That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

"The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

"Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

"Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal."

Command: "keep daily... record of distilled spirits received and disposed of"

"such records" thus defined as "daily records"

Again "daily records" carefully distinguished from "transcripts"

Does not refer to "transcripts", which are "rendered" to Commissioner and hence cannot be "preserved" by dealer

Sanctions to enforce command: "keep daily record of distilled spirits received and disposed of"

Command: "render... transcripts"

Sanctions to enforce command: "render... transcripts"

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	3
Argument	4
Conclusion	11
Appendix A	12
Appendix B	13

CITATIONS

CASES:

United States v. *Gilliland*, 312 U.S. 86	7
United States v. *Grimaud*, 220 U.S. 506	9, 10
United States v. *Hutcheson*, 312 U.S. 219	7

STATUTES:

Criminal Code, Sec. 35(A), 18 U.S.C. (1940 ed.) 80, now 18 U.S.C. 1001	6, 7
26 U.S.C. 2800	9
26 U.S.C. 2857	3, 4, 5, 6, 7, 8, 9, 10
26 U.S.C. 3176	8
26 U.S.C. 3793	7

REGULATIONS:

Code of Federal Regulations, Supp. 1940: Secs. 194.75 to 194.81	2, 4, 9

RULES:

Rule 7(c) F.R.Crim.P.	7

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 470

EUGENE V. HENSLEY, JAMES W. HENSLEY, UNITED SALES COMPANY, a corporation, and UNITED DISTRIBUTORS, INC., a corporation, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 180-190) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 29, 1948 (R. 191). The petition

for a writ of certiorari was filed December 20, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the indictment charges offenses against the United States.

2. Whether 26 U.S.C. 2857 authorizes the Commissioner of Internal Revenue to require by regulation that wholesale liquor dealers enter in their daily records the names and addresses of the persons to whom deliveries of distilled spirits are made by them.

3. Whether the regulations promulgated by the Commissioner and approved by the Secretary of the Treasury (Sec. 194.75(a) and (b), C.F.R., Supp. 1940) requiring the wholesale liquor dealers specified in the statute to keep a record of the names and addresses of the persons to whom they deliver distilled spirits is void for vagueness because it does not contain a statement of the contents or a facsimile of the form on which such names and addresses are required to be entered, but merely designates the form by name and number.

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the statutes and regulation involved are set forth in the Appendix, *infra*, pp. 12-19.

STATEMENT

An indictment in 69 counts was filed against petitioners and James O. Cox in the District Court for the District of Arizona. Counts 1 to 68, inclusive, are identical except as to the names of the accused, the date of the offense, and the name and address of the person or persons to whom distilled spirits were sent. These counts charged that petitioners and one James O. Cox, then being wholesale liquor dealers, selling or offering for sale distilled spirits in quantities of five wine gallons or more to the same person at the same time, were required to keep daily a record of distilled spirits disposed of by them on a form prescribed by the Commissioner of Internal Revenue, to wit, Form 52B, indicating thereon, among other things, the name and address of the person or persons to whom distilled spirits were sent. It was then charged that petitioners and Cox made false entries in Form 52 B as to the name and address of the person or persons to whom distilled spirits were sent, in violation of 26 U.S.C. 2857. (R. 2-57.) Count 69 charged that petitioners and Cox conspired to commit violations of 26 U.S.C. 2857 by making and causing false entries to be made in the Forms 52 B (R. 57-59).

On motion of the Government at the close of its case, certain of the counts were dismissed (R. 96-97). The jury acquitted Cox on all counts in which he was named as a defendant (R. 101-102). Peti-

tioner Eugene V. Hensley was found guilty on 24 counts (R. 104-108) and was sentenced to imprisonment for one year and fined $2,000 on each (R. 142-143). Petitioner James W. Hensley was convicted on eight counts (R. 103-104) and sentenced to six months' imprisonment and fined $2,000 on each (R. 144-145). Petitioners United Sales Company and United Distributors, Inc., were convicted on five and four counts, respectively, and were each fined $2,000 on each of such counts (R. 99-101, 145-147). All of the sentences are concurrent. On appeal, the judgments of conviction were affirmed (R. 180-191).

ARGUMENT

The meager record on appeal does not contain the evidence adduced at the trial and petitioners raise no question as to the sufficiency of the evidence to show that they made the false entries charged in the indictment.

1. Each count of the indictment described the record in which false entries were alleged to have been made as "Form 52 B". This form is a transcript, rendered monthly under oath, of the daily records of distilled spirits disposed of by a wholesale liquor dealer. The daily record required by the statute, 26 U.S.C. 2857, *infra*, pp. 12-13, and the regulations prescribed by the Commissioner of Internal Revenue, Sections 194.75(a) and (b), C.F.R., Supp. 1940, *infra*, pp. 13-14, is kept on a form described in the regulations as "Record 52".

Petitioners assert (Pet. 9-12) that the statute prescribes a penalty only for making a false entry in the daily records required to be kept, that it does not impose a penalty for making a false entry in the transcript of such records (Form 52 B) which the statute also requires wholesalers to render under oath, and that the indictment therefore fails to state an offense. It does not appear that the court below considered the precise question, and it is not clear that the point was called to the court's attention. We think that the contention is without merit.

Each count of the indictment follows substantially the language of 26 U.S.C. 2857 in charging that petitioners were required to keep a daily record of distilled spirits disposed of by them and that they made a false entry in the record so described. This record is identified in the indictment as Form 52 B, rather than Record 52. It appears that at the trial the various entries introduced which were alleged to be false were taken from Forms 52 B (e.g. R. 67, 109, 137-138). But Form 52 B is simply a sworn monthly transcript of the daily entries required to be made in Record 52. Hence, if we assume that petitioners' construction of the statute is correct, it is obvious that they were not prejudiced by the technical fault in the indictment in identifying the daily records alleged to have been falsified as "Form 52 B". The entries in the sworn Forms 52 B concerning the distilled spirits dis-

posed of must of necessity have been the same as those contained in the daily records kept by petitioners, i.e., Record 52. If they were not the same, petitioners were in a favorable position to determine that fact, for the original records were their own and presumably were in their possession. It was an easy matter for them to ascertain whether the sworn transcripts they had rendered were authentic copies of their original daily records. Consequently, petitioners could not have been taken by surprise or placed at any disadvantage by the fact that the indictment specified Form 52 B in each count as the record in which a false entry had been made.

But even on petitioners' hypothesis that the indictment charged false entries in the sworn monthly transcripts rendered to the Bureau of Internal Revenue (Form 52 B) and that 26 U.S.C. 2857 does not provide a penalty for such false entries, they are in no better position. Section 35(A) of the Criminal Code (18 U.S.C. (1940 ed.) 80, now 18 U.S.C. 1001) provided that "Whoever * * * shall knowingly and willfully * * * make or cause to be made any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years or both." The making of a false statement in Form 52 B clearly falls within the proscription of this

section. Section 35(A) with its provision as to false and fraudulent papers has its place as a fitting complement to other statutes under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required. *United States* v. *Gilliland,* 312 U. S. 86, 95-96.[1] Thus, in view of the provisions of 26 U.S.C. 2857 and the regulations thereunder relating to Form 52 B, the indictment by necessary implication stated an offense under Section 35(A).

It is true that the indictment did not specifically refer to Section 35(A) of the Criminal Code. But error in the citation of the statute or its omission is not ground for dismissal of an indictment or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice. Rule 7(c), F. R. Crim. P.; *United States* v. *Hutcheson,* 312 U. S. 219, 229. It is difficult to see how petitioners could have been misled or prejudiced by the omission of a reference to this statute in preparing their defense to charges that they made false statements in the transcripts of their own records. In this connection, petitioners appear to be in the position of not challenging the findings of the jury that the copies of their own

[1] See also 26 U. S. C. 3793 which imposes a penalty of imprisonment of from one to five years for "Every person who * * * falsely or fraudulently executes or signs any * * * entry or other document required by the provisions of the internal revenue laws."

records submitted by them under oath contained false statements and at the same time contending that the prosecution must fail because the Government did not allege and prove directly that the false statements were in their original records from which they made the sworn copies.

2. Petitioners also contend (Pet. 13-14) that 26 U.S.C. 2857 requires only that wholesale liquor dealers keep records of the quantities of distilled spirits received and disposed of, that it does not require such dealers to keep records of the names and addresses of the persons to whom distilled spirits are sent, and that the Commissioner was therefore without authority to promulgate a regulation requiring such records to be kept.

We believe that the court below was clearly correct in construing Section 2857 as authorizing the Commissioner to require wholesale liquor dealers to keep records of the names and addresses of persons to whom they send distilled spirits. There is nothing in the language of that section which forbids that construction, and, on the contrary, the language of the section reasonably comprehends it. The section requires the keeping of a "record of distilled spirits received and disposed of," and then provides that such record shall be kept "in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe." And, in addition, 26 U.S.C. 3176 vests the Commissioner, with the approval of

the Secretary, with general authority to prescribe and publish all needful rules and regulations for the enforcement of Chapter 26, Title 26, U.S.C., which relates to the assessment and collection of taxes imposed on distilled spirits and of which Section 2857 is a part. Thus, Congress has required by Section 2857 that a record of distilled spirits received and disposed of be kept, and has also given the Commissioner power to make regulations to carry it into effect, which necessarily embraces the power to supply the administrative details. *United States* v. *Grimaud,* 220 U. S. 506, 516. The unmistakable purpose of Section 2857 is to assist the Government by supplying it with information to be used in connection with the collection of taxes on distilled spirits. The regulations here involved (Sections 194.75 to 194.81, Title 26, C. F. R., Supp. 1940, *infra,* pp. 13-19) are plainly adapted to that purpose. For example, there can be no doubt that information as to the names and addresses of persons who purchase substantial quantities of distilled spirits at wholesale is of great value from time to time in connection with the collection of floor-stocks taxes, for without it the Government might well be at a disadvantage in detecting attempted evasions of the payment of that class of taxes. See 26 U.S.C. 2800 (h), (i), (j), and (k). We submit, therefore, that the Commissioner's regulatory requirement that wholesale liquor dealers keep a record of the names and addresses of

the persons to whom distilled spirits are sent did not go outside of the circle of that which Section 2857 affirmatively required to be done and treated as unlawful if not done. *United States* v. *Grimaud*, *supra*, at 518.

3. Finally, petitioners assert (Pet. 15-22) that the regulation requiring wholesale liquor dealers to keep records of the names and addresses of persons to whom distilled spirits are sent is void for vagueness, because the requirement is found only in the headings of the form on which the record is to be kept and the regulation itself does not contain a facsimile of the form. We do not believe this contention is of sufficient substance to require extended discussion. Petitioners do not contend that they were unable to obtain copies of the necessary forms, or that they were unable to understand the regulation and forms, or that they were, for that reason, unable to comply therewith by filling in the forms with the correct information plainly called for in the headings. See Form 52 B (R. 109). On the contrary, there seems to be no doubt that the false entries made by petitioners in their records could not have been the consequence of their inability to understand the regulation and the forms which were designated therein. After obtaining the forms and making false entries in them, petitioners now contend that the regulation was so vague as to make honest compliance therewith impossible. We submit that such a contention is without merit.

CONCLUSION

The decision of the court below is correct and no conflict of decisions is involved. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

JOHN R. BENNEY,
ROBERT S. ERDAHL,
Attorneys.

January 1949.

APPENDIX A

26 U. S. C. 2857:

§ 2857. Books of rectifiers and wholesale dealers —(a) Requirements.

Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided*, That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval

of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal.

APPENDIX B

Title 26, Code of Federal Regulations, Supp. 1940:

§ 194.75 *Records to be kept by wholesale liquor dealers.* (a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, "Wholesale Liquor Dealer's Record," and render monthly transcripts, Forms 52A

and 52B, "Wholesale Liquor Dealer's Monthly Report," and Form 338, "Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B)."

(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with the instructions printed thereon, not later than the close of business of the day on which the transactions occur: *Provided,* That if the keeping of such separate record is approved by the district supervisor, a wholesale liquor dealer may keep a separate record, such as invoices, of the removal of distilled spirits, showing the removal data required to be entered on Record 52, but the daily entries of the removal of distilled spirits from his premises shall be made on Record 52 not later than the close of business of the following business day.

(c) A dealer who sells wines or malt liquors, or both, in wholesale quantities, and who sells distilled spirits in retail quantities, is not required to keep Record 52 or to file monthly transcripts, Forms 52A and 52B, and report, Form 338.

(d) Wholesale liquor dealers who sell wines and malt liquors only, and wholesale malt liquor dealers are not required to keep Record 52 or to file monthly transcripts, Forms 52A and 52B, and report, Form 338.

§ 194.76 *Separate record of serial numbers of cases.* Serial numbers of cases of distilled spirits disposed of need not be entered on Record 52, provided the proprietor keeps at his place of business a separate record, showing such serial numbers, with necessary identifying data, including the date of removal and the name and address of the consignee, provided the keeping of such record is approved by the district supervisor. Such separate record may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills. Such books, invoices, and bills shall be preserved for a period of 4 years and in such manner that the required information may be ascertained readily therefrom, and, during such period, shall be available during business hours for inspection and the taking of abstracts therefrom by revenue officers. If a record in book form is kept, entries shall be made on such separate approved record not later than the close of business of the day on which the transactions occur. The dealer shall note in Record 52, in the column for reporting serial numbers of spirits disposed of, "Serial numbers shown on commercial records per authority dated ....."

§ 194.77 *Entry of miscellaneous items.* Wholesale liquor dealers may enter on Record 52 as one item the total quantity of different kinds of spirits made up from broken cases sold to the same person

on the same day, provided such total quantity is not in excess of 10 gallons. The entry of such items shall be stated as "Miscellaneous" or "Misc." and shall show the date, the name and address of the person to whom sold, and the quantity. The total quantity of such miscellaneous spirits so disposed of during the month shall be reported in the monthly summary, Form 338, as "Miscellaneous": *Provided,* That the wholesale liquor dealer determines by actual inventory the quantity of each kind of spirits remaining on hand at the end of the month.

§ 194.78 *Place where Record 52 shall be kept.* (a) Except as provided in paragraph (b), the wholesale liquor dealer shall keep Record 52 at the place of business covered by his wholesale liquor dealer special tax stamp, if spirits are received and sent out from such premises.

(b) If the place of business covered by the wholesale liquor dealer special tax stamp is not the same premises where the spirits are received and sent out, the wholesale liquor dealer shall keep his Record 52 at the latter place and render transcripts from such place on Forms 52A and 52B and summary report on Form 338; *Provided,* That, if approved by the district supervisor, a wholesale liquor dealer may keep his Record 52 at the place of business covered by the special tax stamp and render transcripts on Forms 52A and 52B and

summary report on Form 338 from such place. If, however, the place of business covered by the special tax stamp is not in the same supervisory district as the place where the spirits are received and sent out, Record 52 must be kept at the latter place and transcripts on Forms 52A and 52B and summary report on Form 338 rendered to the district supervisor of that district.

§ 194.79 *Wholesale liquor dealer maintaining a retail department.* (a) A wholesale liquor dealer who sells distilled spirits at wholesale and at the same premises sells distilled spirits at retail in his capacity as a retail dealer in liquors, and who maintains a separate retail department, shall keep Record 52 at his wholesale department of all distilled spirits there received and disposed of. Distilled spirits transferred from the wholesale department to the retail department shall be reported on Record 52, part 2, as "Transferred to Retail Department." Where it is necessary in the filling of a wholesale order to take liquor out of the retail department, the quantity removed from the retail department must be shown on Record 52, part 1, as "Transferred from Retail Department," and the entire sale shown in Record 52, part 2, as a disposal.

(b) The retail department need not be maintained in a separate room or be partitioned off from the wholesale department, but the retail department must in fact be separate from the wholesale department.

(c) Where a wholesale liquor dealer sells at both wholesale and retail, and does not maintain a separate retail department, all distilled spirits received and disposed of shall be entered on Record 52.

§ 194.80 *Monthly reports.* (a) A wholesale liquor dealer shall file transcripts of Record 52 on Forms 52A and 52B, and a summary report on Form 338, with the district supervisor, on or before the tenth day of the succeeding month. Record 52 shall be preserved for a period of 4 years and, during such period shall be available during business hours for inspection and the taking of abstracts therefrom by any internal revenue officer.

(b) If there be no receipts and disposals of distilled spirits by a wholesale liquor dealer, during any month, it will be necessary to forward monthly summary on Form 338 only to the district supervisor, showing the quantity on hand the first day of the month and the quantity on hand the last day of the month and marked "No transactions during month."

When a wholesale liquor dealer discontinues business as such, he shall render monthly reports, Forms 52A and 52B and the summary report on Form 338, covering transactions for the month in which business is discontinued, and mark such reports "Final." Record 52 shall be preserved by the dealer for a period of 4 years thereafter.

§ 194.81 *Forms to be provided by users at own expense.* Record 52, Forms 52A, 52B, and 338 will be provided by users at their own expense, but must be in the form prescribed by the Commissioner: *Provided,* That, with the approval of the Commissioner, they may be modified to adapt their use to tabulating or other mechanical equipment: *Provided further,* That where the form is printed in book form, including loose-leaf books, the instructions may be printed on the cover or the fly leaf of the book instead of on the individual form.

☆ U.S. GOVERNMENT PRINTING OFFICE 1949—820980/P.O. 348